Pang Kok v Leong Fock Hap & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 23-325-1993
ABDUL MALIK ISHAK J
30 DECEMBER 1995

Civil Procedure *— Costs — Getting up fee — Relevant principles for determining — Whether 10% of quantum awarded a standard rate — Running down case settled on question of liability but proceeded to trial on quantum — Whether SAR failed to take into account fact that case proceeded to trial in assessing getting up fees — Rules of the High Court 1980 O 59 App 1 Pt X para 1(2)*

The plaintiff in a running down case applied for review of an award of getting up fees of RM5,000 by the senior assistant registrar ('the SAR'), who had awarded the sum to the plaintiff on the wrong assumption that the case was settled. The issue of liability had been agreed between the parties without the necessity of calling witnesses, but the case had proceeded to trial on the sole issue of the quantum of damages, for which purpose two witnesses were called.

Held, increasing the getting up fees from RM5,000 to RM10,000:

(1) It was incorrect that the standard getting up fees should be 10% of the quantum awarded by the court to the plaintiff and this was clearly reflected in O 59 App 1 Pt X para 1(2) of the Rules of the High Court 1980. Such an approach could result in massive or disproportionate figures being awarded by the taxing officer (see p 101C–D).

(2) The present case could be categorized as the run of the mill type case and involved taking orders, attending court, examination, weighing of facts and law, finding law and authorities and preparing the case for trial. There was work done in getting up the plaintiff's case and counsel ought to be rewarded for it. If the SAR had been informed that the case proceeded to trial on the basis of the quantum of damages, he might of assessed the getting up fees on a higher scale. In the circumstances, the court was empowered to review the SAR's decision on the basis that he had disregarded a material matter, and the getting up fees were increased to RM10,000 (see pp 101F–I, 102A; *Douglas v Associated Newspapers Ltd* (1922) 67 Sol Jo 48 and *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* [1975] 2 All ER 436; [1975] 1 WLR 1504 followed, *Maxim v Godson & Sons* [1916] 1 Ch 21 distinguished).

[Bahasa Malaysia summary

Plaintif dalam suatu kes pelanggaran memohon kajian semula award fee penyediaan guaman iaitu RM5,000 oleh penolong kanan pendaftar ('PKP itu'), yang telah mengawardkan jumlah itu kepada plaintif di

atas andaian yang salah bahawa kes itu telah diselesaikan. Isu tanggungan telah dipersetujui oleh kedua-dua pihak tanpa keperluan memanggil saksi, tetapi kes telah dibicarakan untuk isu tunggal iaitu kuantum ganti rugi, di mana dua orang saksi telah dipanggil untuk tujuan itu.

Diputuskan, menambah fee penyediaan guaman dari RM5,000 ke RM10,000:

(1) Adalah salah bahawa fee penyediaan guaman biasa adalah 10% dari kuantum yang diaward oleh mahkamah kepada plaintif dan ini dengan jelasnya dibayangkan dalam A 59 App 1 Bab X perenggan 1(2) Kaedah-Kaedah Mahkamah Tinggi 1980. Pendekatan yang sebegitu akan mengakibatkan jumlah yang besar atau tidak seimbang diaward oleh pegawai cukai (lihat ms 101C–D).

(2) Kes ini boleh dikategorikan sebagai kes jenis biasa dan melibatkan mengambil arahan, menghadiri mahkamah, pemeriksaan, menimbangkan fakta-fakta dan undang-undang, mencari undang-undang dan autoriti dan menyediakan kes untuk perbicaraan. Kerja telah dilakukan untuk menyediakan kes plaintif dan peguam patut diberi ganjaran untuknya. Jika PKP telah diberitahu bahawa kes seterusnya dibicarakan di atas soal kuantum ganti rugi, dia mungkin mentaksirkan fee penyediaan guaman itu di atas skala yang lebih tinggi. Dalam keadaan ini, mahkamah dibenarkan untuk mengkaji semula keputusan PKP itu di atas alasan bahawa dia telah tidak mengendahkan perkara yang penting, dan fee penyediaan guaman telah dinaikkan kepada RM10,000 (lihat ms 101F–I, 102A; *Douglas v Associated Newspapers Ltd* (1922) 67 Sol Jo 48 dan *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* [1975] 2 All ER 436; [1975] 1 WLR 1504 diikut, *Maxim v Godson & Sons* [1916] 1 Ch 21 dibeza).]

Notes

For cases on getting up fees, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 900–910.

Cases referred to

Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors [1990] 1 MLJ 292

Chin Cham Sen v Foo Chee Sang & Anor [1952] MLJ 99

Douglas v Associated Newspapers Ltd (1922) 67 Sol Jo 48

JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors [1994] 1 MLJ 47

John Tan Chor-Yong v Lee Chay Tian [1971] 1 MLJ 240

Kana Moona Syed Abubakar (decd); Khatijah Nachiar v Sultan Allaudin and the Assistant Official Assignee, Penang & Ors, Re [1940]

A MLJ 4
L & M Airconditioning & Refrigeration (Pte) Ltd v SA Shee & Co (Pte) Ltd [1993] 3 SLR 482
Maxim v Godson & Sons [1916] 1 Ch 21
Pelster v Pelster and Samuel [1936] 3 All ER 783
B *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* [1975] 2 All ER 436; [1975] 1 WLR 1504
Starlite Ceramic Industry Ltd v Hiap Huat Pottery [1973] 1 MLJ 146
Theocharides v Joannou [1955] 1 All ER 615
United Malayan Banking Corp Bhd v Indah Sejati Sdn Bhd [1992] 1 AMR 41:77
C *Welltrade Middle East Ltd & Anor v Wakelin, Pf & Ors* [1984] 1 MLJ lxiv
Yeo Ah Tee v Lee Yong Heng & Ors [1993] 1 MLJ 17

Legislation referred to

D Rules of the High Court 1980 O 59 App 1 Pt X para 1(2)

RK Menon (*RK Menon & Co*) for the plaintiff.
Lai Kuan Jean (*Taye & Co*) for the defendant.

E **Abdul Malik Ishak J**: The plaintiff was awarded getting up fees at RM5,000 by the senior assistant registrar ('the SAR') and being dissatisfied he applied for a review ('encl 48'). The SAR awarded that sum on the assumption that the case was settled. This was certainly a wrong assumption. Though the issue of liability was agreed between the parties without the necessity of calling witnesses yet the case proceeded to trial on the sole F issue of the quantum of damages. Two witnesses were called for this purpose and some efforts must have been put into it.

The following propositions are quite settled and reflected in the numerous decided cases.

Firstly, 'for purposes of taxation of costs running down actions could G be considered to be the simplest of cases' (*Canopee Investment Pte Ltd & Ors v Landmarks Holdings Bhd & Ors* [1990] 1 MLJ 292). The present case falls squarely as a runner case and should be an easy matter to handle.

Secondly, the guidelines to determine the amount of getting up fees are clearly set out in para 1(2) of Pt X, App 1 to O 59 of the Rules of the H High Court 1980 ('the RHC') and this was adverted to in the case of *United Malayan Banking Corp Bhd v Indah Sejati Sdn Bhd* [1992] 1 AMR 41:77. According to the above-mentioned provision, the taxing officer must consider:

(a) the complexity of the item or of the cause or matter in which it arises I and the difficulty or novelty of the questions involved;

(b) the skill, specialized knowledge and responsibility required of, and the time and labour expended by the solicitor or counsel;

(c) the number and importance of the documents (however brief) prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the cause or matter to the client;

(f) where money or property is involved, its amount or value; and

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

See *Welltrade Middle East Ltd & Anor v Wakelin, Pf & Ors* [1984] 1 MLJ lxiv for comparison with the Singapore version.

Thirdly, in allowing the amount for getting up fee, the taxing officer should be chiefly concerned and guided by the amount at stake together with the importance of the issue involved (see *Chin Cham Sen v Foo Chee Sang & Anor* [1952] MLJ 99).

Fourthly, the taxing officer is bound by the prescribed scale of costs as set out in the RHC (see *JP Finance (M) Bhd v Tanswan Brothers Enterprise Sdn Bhd & Ors* [1994] 1 MLJ 47).

Fifthly, when the law is reasonably clear despite the research in which both counsel appear to have indulged, the getting up fee should not be unduly inflated (see *John Tan Chor-Yong v Lee Chay Tian* [1971] 1 SLJ 240 — this was a defamation case).

Sixthly, gathering indiscriminately all documents which had some connection with the case and compiling them into bundles without giving sufficient care and attention to the preparation and compilation of relevant documents for trial would bar the plaintiffs' counsel from obtaining costs in respect of several items of getting up (see *L & M Airconditioning & Refrigeration (Pte) Ltd v SA Shee & Co (Pte) Ltd* [1993] 3 MLR 482).

Seventhly, the court will not interfere with the decision of the taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion after consideration of all the circumstances and if no question of principle arises. It is only when such discretion has been exercised on some wrong principle or the quantum allowed is obviously wrong that a judge will interfere. It follows from these principles that there may well be cases in which a 'getting up' done before the issue of the writ would be held to be necessary and proper and a fee for it allowed. One example of such a case would be a libel action (see *Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146).

Eighthly, where proceedings in an action have reached a stage when a hearing in open court is inevitable, the solicitors of the parties are entitled to be in readiness for the hearing and must be compensated for the work done irrespective of whether there was actually a hearing in open court or not (see *Yeo Ah Tee v Lee Yong Heng & Ors* [1993] 1 MLJ 17).

Ninthly, on the question of the allowance or non-allowance of a getting up fee, the true test to apply is not whether or not an issue has proceeded to trial but whether or not an advocate and solicitor has acted

reasonably and properly in getting up his client's case in readiness for trial. If he has done so he is entitled to a getting up fee regardless of whether the case has actually proceeded to trial or not (see *Re Kana Moona Syed Abubakar (decd); Khatijah Nachiar v Sultan Allaudin and the Assistant Official Assignee, Penang & Ors* [1940] MLJ 4).

Lastly, save in an exceptional case or where some question of principle is involved, the court will not interfere with the decision of a taxing officer (see *Theocharides v Joannou* [1955] 1 All ER 615; *Pelster v Pelster and Samuel* [1936] 3 All ER 783).

It is wrong to suggest as was suggested by Mr RK Menon, learned counsel for the plaintiff, that the getting up fees should be 10% of the quantum awarded by the court to the plaintiff. With respect in a getting up exercise by the taxing officer, this is not a factor which should be considered and this is clearly reflected in para 1(2) of Pt X, App 1 to O 59 of the RHC. Assuming for one moment, that 10% is the standard rate for all getting up cases, we would see a situation where a colossal figure would be awarded by the taxing officer. For instance, in *United Malayan Banking Corp Bhd v Indah Sejati Sdn Bhd*, the subject matter was almost RM3m and applying the 10% rule the getting up fees should be RM300,000. But this was not how James Foong J in *United Malayan Banking Corp Bhd v Indah Sejati Sdn Bhd* decided the issue of getting up. His Lordship there considered that there was no difficulty or novelty in the subject matter, but a certain amount of skill and knowledge was required from an advocate and solicitor in a foreclosure proceeding. His Lordship then awarded RM30,000 as getting up fees — a mere 1% out of the RM3m subject matter. Now, the quantum awarded by my immediate predecessor for the present case was RM138,173.27 and applying the 10% rule the getting up fees would be RM13,817.33 but when one applies the 1% rule it would come to a miserable figure of RM1,381.73. Must I then accede to Mr RK Menon's novel suggestion? Certainly not. The present case can be categorized as the run of the mill type of cases. Item 26 which is said to be the work of the plaintiff's counsel entails:

> mengambil arahan, menghadiri mahkamah, pemeriksaan, menimbangkan fakta-fakta dan undang-undang, mencari undang-undang dan autoriti dan menyediakan kes untuk perbicaraan.

Without a doubt, work was done by Mr RK Menon in getting up the plaintiff's case and he should be rewarded for the work done. The SAR in his reasons which was prepared with some good measure of research thrown into it, considered all the points that needed to be considered and had he been informed that the case proceeded to trial on the basis of the quantum of damages he might have assessed the getting up fees on a higher scale. Be that as it may, from the authorities I am empowered to review and overrule the decision of the SAR on the question of getting up when he has proceeded on a wrong principle or disregarded material matter or had regard to irrelevancies (see *Douglas v Associated Newspapers Ltd* (1922) 67 Sol Jo 48 and compare it with *Maxim v Godson & Sons* [1916] 1 Ch 21). Even the wrong approach by the taxing officer as

envisaged in *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* [1975] 2 All ER 436; [1975] 1 WLR 1504 would attract a review by the court.

For these reasons, I enhanced the getting up fees from RM5,000 to RM10,000 and made orders to that effect.

Order accordingly.

Reported by AP Kinnear